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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

Nos. 73-1234 and 73-1231

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TRUCK DRIVERS UNION LOCAL NO. 413, AND TEXTILE WORKERS UNION,
Respondent.

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

AND

TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE*.

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* Pursuant to its Motion, granted by the Court, the Chamber filed a brief *amicus curiae* in support of the petitions for Writ of Certiorari herein.

The Chamber of Commerce of the United States of America respectfully moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief *amicus curiae* on behalf of the petitioners in these cases.

The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in this Court in matters involving important questions concerning the administration and interpretation of the National Labor Relations Act. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests as an aide to this Court's deliberations in a number of such cases.**

The question presented in the instant cases—whether an employer, who has not interefered with the National Labor Relations Board's representation election process, may be required to bargain with a union asserting that it is the representative of a majority of the employer's employees where the union's majority status has not been established through the Board's election processes—is a matter of significant concern not only to the Chamber's membership but also for the administration of the National Labor Relations Act generally. The Board and the court below have reached far different conclusions with respect to the obligation of an employer who is confronted with

** *E.g., N. L. R. B.* v. *Bell Aerospace Company, Division of Textron, Inc.*, No. 72-1598 (1974); *N. L. R. B.* v. *The Boeing Company, et al.*, 412 U. S. 84 (1973); *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213 (1972); *N. L. R. B.* v. *Burns Int'l Security Services, Inc.*, 406 U. S. 272 (1972); *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157 (1971); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99 (1970).

a union demand for recognition. Therefore, the decision of this Court is one which will significantly determine the future direction of the representation process, and will touch and concern every employer subject to the jurisdiction of the Act. The Chamber is thus vitally concerned that this issue be properly resolved by this Court. Because of its broad representation of employers, the Chamber is in a position to present arguments to this Court concerning the instant issue which might not otherwise be advanced by the parties.

Wherefore, for the foregoing reasons, the Chamber of Commerce of the United States respectfully requests that this Motion for Leave to File Brief *Amicus Curiae* be granted.

Respectfully submitted,

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

INTEREST OF THE AMICUS.

The interest of the Chamber is set forth in the foregoing "Motion for Leave to File Brief *Amicus Curiae*."

SUMMARY OF ARGUMENT.

I.

In *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U. S. 575 (1969), this Court held that the touchstone in determining whether the representation election process mandated in the National Labor Relations Act, as amended, 29 U. S. C. Sec. 151, *et seq.*, should be bypassed, and an employer should be ordered to recognize and bargain with a union seeking recognition, was whether the employer committed unfair labor practices which rendered the holding of a fair election improbable. The Court affirmed the Board's view that an employer's subjective motivation, his "good faith doubt", in rejecting the Union's claim was irrelevant and would not support the issuance of a bargaining order. Consistent with this Court's rationale in *Gissel*, the Board, in the instant cases, concluded that inquiry into an employer's subjective state of knowledge was a return to the good faith doubt "thicket", and that where the employer committed no unfair labor practices which would tend to undermine the election process, a bargaining order would not lie.

The Court of Appeals, on the other hand, posits a rule which would require the employer to file an election petition to demonstrate his "good faith doubt" whenever a union presents asserted evidence of majority status if he is to avoid inquiry into the actuality of his subjective motivation in refusing to recognize the union and requesting that the union seek an election. The Court of Appeals, thus, resurrects the good faith doubt test contrary to the rationale of *Gissel*.

II.

The lower court's view that the Act compels an employer to recognize a union or initiate the election process whenever the union asserts a claim of majority status is not supported by and is contrary to Congressional design; is destructive of basic policies which permit the employer to present his views against unionism and which seek to engender informed and reasoned employee selection through the election machinery; encourages unions to bypass the Congressionally preferred election procedure and engage in recognitional strikes and picketing contrary to the literal wording and policy of the Act; and, by placing the affirmative burden on employers to institute the election process, erroneously restructures that process, relieving the union of burdens heretofore deemed essential and transforming that process into a vehicle for tactical maneuverability in the hand of unions.

III.

The error of the lower court's view results from its failure to comply with the command of *Gissel* that the pertinent inquiry in determining the propriety of a bargaining order is whether a fair election may be held, and from the court's adherence to the remaining vestige of "good faith doubt" embodied, for example, in the doctrine of *Snow & Sons*, 134 NLRB 709 (1961), *enf'd.* 308 F. 2d 687 (CA 9, 1962). The disagreement between the Board and court below thus fails to come fully to grips with the *Gissel* analysis in two respects: (1) In "Category I, II and III" cases, by failing to engage in the causal analysis necessary to determine whether, when an employer has engaged in unfair labor practices, they are of the type which would render a fair election improbable; and (2) in "Category IV" cases, where the employer has committed no unfair labor practices or the unfair labor practices are so removed from the election process as to be *de minimus*, that what the employer might know, see or expect has no bearing on whether a fair

election may be held and, therefore should not give rise to a bargaining order. Examination of the *Snow & Sons* doctrine and of the Board's failure to engage in the causal analysis ordered by *Gissel* in post-*Gissel* cases, suggests that the Board has not fully conformed with this Court's directive, and further direction by this Court is needed to instruct, consistent with its *Gissel* rationale, that a bargaining order is appropriate *only* when pervasive unfair labor practices have rendered the use of traditional remedies ineffective.

ARGUMENT.

For years, the National Labor Relations Board and the courts struggled with the problem of determining under what circumstances the Board's representation election procedures may properly be bypassed and an employer ordered to bargain with a union claiming to represent his employees. Finally, in *N. L. R. B.* v. *Gissel Packing Co.*, 395 U. S. 575 (1969), the Board recognized, with this Court's approval, that the propriety of ordering an employer to bargain with a union demanding recognition is governed by whether the employer has engaged in serious unfair labor practices which render the likelihood of free expression through the election process improbable.

In the instant cases, the Board adhered to the rationale of *Gissel*, and with this adherence the *Amicus* agrees. The Court of Appeals herein, however, departed from the reasoning of *Gissel*, and its decision should be reversed.

I.

THE DECISION BELOW IS CONTRARY TO THE RATIONALE OF THIS COURT'S DECISION IN GISSEL.

The thrust of this Court's decision in *Gissel* is to disaffirm the relevancy of any inquiry into an employer's subjective motivation in determining the propriety of a bargaining order when that employer is confronted with a union's demand for recognition and asserted evidence of majority status. Rather, in *Gissel*, this Court viewed the employer's overt conduct in response to unionization and the impact of that conduct on the representation process as the factors determinative of whether bargaining order recognition should take precedence over the Board's election process in the effectuation of the purposes and

policies of the Act. Thus, the *Gissel* Court articulated two categories of employer unfair labor practices which, because of their impact upon the election process, (1) render a fair election impossible[1] and (2) those unfair labor practices which though less pervasive than those in category one, "still have the tendency to undermine majority strength and impede the election process."[2] That the employer's subjective motivation is irrelevant and that it is the impact of his conduct on the election process that is the key, is borne out by a third category of "minor or less extensive unfair labor practices, which because of their minimal impact on the election machinery, will not sustain a bargaining order."[3]

There is a fourth category of employer "response" along this continuum that the *Gissel* Court expressly declined to evaluate[4] and that is placed in issue by the instant cases: Whether an employer who refrains from committing unfair labor practices that would tend to destroy "laboratory conditions" of the election process is properly subject to a bargaining order by insisting that the union seek an election. The logical thrust of *Gissel* compels the conclusion that a bargaining order is not appropriate where, as here, the employers have engaged in no conduct destructive of a fair election, and since, as the *Gissel* Court acknowledged, an election is the "preferred means"[5] to the resolution of recognitional claims. It simply does not follow that while an employer who, in response to a union demand

1. Those unfair labor practices of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies with the result that a fair and reliable election cannot be had." 395 U. S. at 614. The Court explained that in such "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices, a bargaining order would be appropriate to remedy such practices even in the absence of a Section 8(a)(5) refusal to bargain violation or even a bargaining demand by the union.

2. *Id.*

3. *Id.* at 615

4. *Id.* at 595, and 601, n. 18.

5. *Id.* at 602.

and asserted evidence of majority status, commits unfair labor practices of the third category will not be ordered to bargain, another employer, faced with the same demand and asserted evidence of majority support, but without committing any unlawful conduct, will be ordered to bargain solely because the union in the latter instance chooses not to test the strength of its claim in the sanctity of the voting booth.[6]

The problem herein results from a *caveat* to the Board's announced policy[7] of rejecting inquiry into an employer's subjective state of mind: "[A]n employer [who committed no unfair labor practices destructive of the election process] could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union."[8]

This so-called "independent knowledge" exception to the principle announced in *Gissel* is the sole remaining vestige of subjective motivation inquiry. It has its origin in the case of *Snow & Sons*,[9] where the employer agreed to a check of the

6. By its decision in *Bernel Foam Prods. Co.*, 146 NLRB 1277 (1964), the Board sought to encourage union resort to the election process by permitting unions to seek elections without foregoing the right to later obtain a bargaining order should the employer's pre-election conduct unlawfully dissipate the union's claimed majority status, resulting in a union loss at the polls. Prior to *Bernel Foam*, a union claiming majority support had to elect whether to demand recognition and seek confirmation through refusal to bargain charges or whether to seek an election. A choice of one option waived the other. As a result of *Bernel Foam*, however, unions were not forced into a Hobson's choice, with the result that the desired "laboratory conditions" which foster informed and free choice would have the opportunity to prevail.

7. "Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with election processes and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple 'no comment' to the union." *Gissel, supra*, at 594

8. *Id.* at 594 (Emphasis the Court's).

9. 134 NLRB 709 (1961), *enf'd.* 308 F. 2d 687 (CA 9, 1962).

union's authorization cards and, after satisfying himself from the evidence of those cards that the union represented a majority, continued to refuse to recognize the union. The Board has, therefore, taken the position that the independent knowledge test is limited to the situation where an employer reneges on an agreement to have the union's majority established by a means other than a Board election.[10] In the Board's view, any further expansion of the independent knowledge test would be a return to the "good faith doubt thicket" laid to rest in *Gissel*. As the Board explained in the *Linden* case herein, in apparent obedience to the logic and rationale of this Court's *Gissel* decision:

> "The facts of the present case have caused us to reassess the wisdom of attempting to divine, in retrospect, the state of employer (a) knowledge and (b) intent at the time he refuses to accede to a union demand for recognition. Unless, as in *Snow & Sons*, the employer has agreed to let its 'knowledge' of majority status be established through a means other than a Board election, how are we to evaluate whether it 'knows' or whether it 'doubts' majority status? And if we are to let our decisions turn on an employer's 'willingness' to have majority status determined by an election, how are we to judge 'willingness' if the record is silent, as in *Wilder*, or doubtful, as here, as to just how 'willing' the Respondent is in fact?"[11]

Accordingly, the Board concluded that an employer's subjective state of knowledge is as irrelevant as subjective good faith doubt in determining the propriety of a bargaining order. The Board's reasoning and its refusal to apply the "independent knowledge" test in *these cases* is therefore consistent with *Gissel* because, as in *Gissel*, the Board focuses on the employer's conduct and the causal effects of his conduct. In the situation confronted in *Gissel* the employer's unfair labor practices have the effect of rendering the election process a nullity. Where,

10. See, the Board's Petition for Writ of Certiorari herein, at p. 15, n. 18.

11. 190 NLRB at 720-721.

however, an employer is faced with asserted evidence of majority support and by his conduct does not seek to destroy the "laboratory conditions", there is no reason for the union's failure to utilize established election procedures.[12]

The lower court, however, justified its rejection of the Board's conclusion herein in a manner contrary to the thrust of *Gissel* and the Board's adherence to the *Gissel* rationale in these cases, by focusing not on the employer's conduct and the implications of that conduct on whether an election would be a useless exercise, but, rather, by resurrecting the ghost of "good faith doubt". Moreover, it did so in such a way as to place the burden of proving his good faith on the employer, a burden which was shifted away from the employer even before the demise of the inquiry into "good faith doubt."[13]

Thus, while the court below recognized the inherent unreliability of asserted evidence of majority support, such as au-

12. While the *Amicus* agrees with the Board's adherence to the *Gissel* rationale in the instant cases, and for this reason and others set forth in our brief herein, urges this Court to reject the views of the Court of Appeals, the Chamber believes that the *Snow & Sons* independent knowledge doctrine, as a basis for bypassing the election procedure, is no longer viable in light of *Gissel*. As set forth more fully hereinafter in Part III of our brief, this lingering retention of the good faith doubt element is inconsistent with the rationale of *Gissel* and has nothing to do with causal effect of unfair labor practices on the election process, the basis for issuing a bargaining order in recognition cases. Examination of the *Snow & Sons* doctrine and the Board's failure to really apply the *Gissel* criteria to the issuance of remedial bargaining orders in post-*Gissel* cases, indicates that, contrary to the Board's asserted policy, good faith doubt is not really a dead letter. Therefore, guidance to the Board with respect to the application of the *Gissel* criteria to the issuance of bargaining orders is needed. Thus, since *Gissel* settled this area of law except for the remaining issue hereunder consideration, the instant case presents an appropriate opportunity for this Court to instruct the Board, consistent with its *Gissel* rationale, that a bargaining order is appropriate *only* when pervasive unfair labor practices have rendered the use of traditional remedies ineffectual.

13. *Aaron Bros. Co.*, 158 NLRB 1077 (1966); *Jem Mfg., Inc.*, 156 NLRB 643 (1966); *John P. Serpa, Inc.*, 155 NLRB 99 (1965), order set aside, *Retail Clarks Local 1179* v. *N. L. R. B.*, 376 F. 2d 186 (CA 9, 1967).

thorization cards or strikes,[14] it nevertheless determined that such concededly unreliable manifestations require the employer to come forward and file his own petition for an election to demonstrate his good-faith doubt if he is to avoid a bargaining order and an inquiry into his subjective state of mind.[15] The lower court, therefore, has returned to the good faith quagmire, contrary to the thrust of *Gissel*. Moreover, it has done so by an erroneous interpretation of the statutory provisions upon which it relies, and in so doing has suggested a rule which is contrary to the policies of the Act as a whole and which drastically restructures the entire representation process.

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14. "Refusal to cross a picket line may reflect mere fear, See *N. L. R. B.* v. *Union Carbide Corp.*, 440 F. 2d 54, 56 (4th Cir., 1971) *cert. denied*, 404 U. S. 826 (1971), or it reflects what the individual supposes is the will of the majority even though he (and in fact a majority) does not wish the union to act as a bargaining representative." *Truck Drivers Local 413* v. *N. L. R. B.*, ...F. 2d ..... 84 LRRM 2177, 2185, n. 44 (CA DC, 1973), [hereinafter cited as *Linden*].

In the *Union Carbide* case, cited by the lower court herein, the Fourth Circuit acknowledged the fact, as testified to by an employee in the Board proceeding, that the employee refused to cross the union's picket line for fear of bodily harm. Moreover, the reasons why employees may refuse to cross picket lines are as varied as their individual personalities. Some may choose not to cross, for example, out of principle wholly unrelated to the goals of the union, out of fear, because of group pressure, or, perhaps, because of social ostracism by fellow employees. Certainly, the alleged "strength" of any inference of majority support to be drawn from a picket line is much less than even that to be drawn from authorization cards.

15. The lower court viewed authorization cards and picketing as creating:

> "[A] sufficient probability of majority support as to require an employer asserting a doubt of majority status to resolve the possibility through a petition for an election, if he is to avoid any duty to bargain and any inquiry into the actuality of his doubt." *Id.*, at 2186.

II.

THE LOWER COURT'S DECISION IS CONTRARY TO THE BASIC POLICIES OF THE ACT AND ERRONEOUSLY AND IMPERMISSABLY RESTRUCTURES THE REPRESENTATION PROCESS.

The lower court's decision rests upon its interpretation of Section 9(c)(1)(B) of the Act, which provides for employer representation petitions,[16] as compelling, under penalty of Section 8(a)(5), an affirmative obligation on the part of an employer to institute the representation process. As set forth below, such an interpretation of that Section 9(c)(1)(B): (a) constitutes an erroneous construction Congressional intent; (b) renders nugatory the employer's Section 8(c) right to present his employees with his views; (c) encourages industrial disruption occasioned by recognitional strikes contrary to the

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16. Section 9(c), in relevant part, provides:

> "(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in Section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in Section 9(a); or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in Section 9(a);
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

policy of Section 8(b)(7)(C); and (d) impermissibly restructures the nature of the representation process.

A. The Lower Court's Interpretation of Section 9(c)(1)(B) Constitutes An Erroneous Construction of Congressional Design.

The legislative history of Section 9(c)(1)(B) reveals that it was enacted precisely to eliminate an unfairness to employers that existed under the Wagner Act, prior to the 1947 Taft-Hartley amendments, which the court below would now reimpose. Under the Wagner Act, employers were permitted to file election petitions only when confronted with multiple claims for recognition by different unions. The Taft-Hartley revisions, thereafter, permitted employers to file petitions when confronted with only one claim for recognition; the requirement that an employer be presented with such a claim prior to filing a petition was inserted, not as reasoned by the court below—to compel an employer to institute the representation process upon union demand, but solely to prevent employer from petitioning "on the first day that a union organizer distributed leaflets at the plant", i.e., to prevent abuse of the representation process.[17]

It is indeed difficult to justify the lower court's view of history that in 1947, Congress, by enacting Section 9(c)(1)(B), intended to further restrict employer—and for that matter employee—options to oppose unionization when the whole thrust of the amendatory legislation in this area confirms that Congress sought to give employers and employees greater options to oppose unionism, and provided the statutory means by which they could exercise those options.

Thus, Section 7 of the Act, the charter of employee rights, was amended to give employees "the right to refrain" from unionization. To Section 9(c)(1) was added the provisions

17. H. R. Rep. No. 245, 80th Cong. 1st Sess. 35 (1947); I Legislative History of the Labor Management Relations Act (I Leg. Hist.), at 326 (1948); S. Rep. No. 105, 80th Cong. 1st Sess. 10-11 (1947), I Leg. Hist. pp. 416-417.

not only to *permit* employer petitions, but also give employees, in the exercise of their "right to refrain", the means to decertify a union that they had become unhappy with. Section 8(b)(1)(A) was added, making it an unfair labor practice for a union to restrain or coerce employees in the exercise of their right to refrain. Section 8(c) was added in recognition of employers' First Amendment right to speak in opposition to unionization and convey his views to his employees.[18] And, in addition to the amendment of Section 9(c)(1) to permit employer petitions and employee decertification petitions, the representation process was further amended in various other respects to provide safeguards and standards which were lacking under the Wagner Act, the absence of which properly subjected the procedures developed by the Board to the Congressional criticism that the "Board has made collective bargaining 'a one way street.' "[19]

18. Under the Wagner Act, employers had no statutory right to speak against unionization and, under early Board decisions, employers were required to maintain strict impartiality with the result that any statements concerning unionism were held to be violative of employees' then Section 7 rights. *E.g., Schult Trailers, Inc.*, 28 NLRB 975 (1941); *Ford Motor Co.*, 23 NLRB 342 (1940); *Southern Colorado Power Co.*, 13 NLRB 699 (1939). Even after *N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469 (1941), wherein this Court held that employers had a Constitutional right to express views that were noncoercive in nature, while the Board developed a less restrictive attitude toward speeches, it continued to otherwise restrict employer's free speech. *E.g., Clark Bros. Co.*, 70 NLRB 802 (1940); *Monumental Life Ins. Co.*, 69 NLRB 247 (1946). Congress found these decisions to be too restrictive and, consequently, enacted Section 8(c). See, S. Rep. No. 105, *supra*, at 23-24; I Leg. Hist., *supra*, at 429-430.

The effect of the rule urged by the lower court herein in rendering nugatory employers' free speech right and employees' right to a fully free and informed choice in the representation process, are explicated in subpart B of this section of the Chamber's brief.

19. S. Rep. No. 105, *supra*, at 10; I Leg. Hist., *supra*, at 416. Thus, Congress carefully amended Section 9(b) to place standards on the selection of bargaining units which it would permit the Board to certify. Section 9(c)(5) was added to reinforce Section 9(b) and to eliminate the Board's practice of basing its bargaining unit determinations on the extent of unions' ability to organize. Section

Simply, the Court of Appeals' interpretation of subsection 9(c)(1)(B) is at basic odds with the whole purpose behind the relevant 1947 revisions of the Act and, accordingly, should be rejected.

B. The Rule Suggested by the Lower Court Is Destructive of the Rights Conferred by Section 8(c) and the Policy of Informed Employee Choice.

Section 8(c), the "free speech" section of the Act,[20] is designed to permit employers the right to present their views concerning the disadvantages of unionism, and as this Court said in *Gissel*, it is a right which is "firmly established and cannot be infringed by a union or the Board."[21] Moreover, a salutary effect of the free speech rule, indeed a policy encouraged by the Board,[22] is an informed employee electorate which, when it makes its decision, has heard the views of both the union and employer and has had the opportunity to consider and reflect upon that decision. The rule suggested by the lower court

9(c)(3) was added to prevent unions which had lost elections from obtaining another election for a year; to preclude from voting employees who had been taken out on strike by a union and who had been permanently replaced; and to restructure the inequitable procedure in runoff elections which had prevented employees from having the opportunity to cast a negative vote in the runoff unless the "neither" vote had a plurality of votes case in the first election. S. Rep. No. 105, *supra*, at 24-25, I Leg. Hist., *supra*, at 430-431.

20. Section 8(c) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

21. 395 U. S. at 615.

22. In explaining reasons for adopting the *Excelsior* rule which requires that both parties have access to employees during organizational drives, the Board stated:

> "The considerations that impel us to adopt the foregoing rule are these: The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone. In discharging that trust, we regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice. *Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice." Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240 (1966). (Emphasis added).

herein[23] renders the employer's right of free speech nugatory and effectively vitiates the policy of encouraging "free and reasoned choice."

If the lower court's suggested rule were adopted, an employer would be required either to recognize the union or file a petition upon demand by the union. The reality of organizational campaigns is that a union does not make a demand for recognition until it is at the pinnacle of its strength. As is most often the case, nascent campaigns are conducted secretly, authorization cards are gathered hurriedly by fellow employees, and the employer is often not aware of the union's presence until authorization cards are gathered and a demand for recognition is made. Thus, the employees have only been exposed to the union's view and have not heard nor had time to consider the counterveiling view. This is true even if the union were to call a strike in support of the demand, and the picket line be honored, as acknowledged by the court below, because of fear or group pressure.

23. The Court of Appeals suggested that the Board adopt the following *per se* rule if it is to avoid inquiry into an employer's subjective state of knowledge:

> "The Board might, in order to reduce litigation and delay in these matters, adopt a rule that an employer must, when presented with an authorization card majority, either recognize the union, or within a reasonable time, petition for a certification election." *Linden, supra*, 84 LRRM at 2186, n. 47.

If an employer were required to recognize the union at that time, as the court suggests, his right to present his views is completely destroyed, and whether or not the employees really would have elected the union in the privacy of the voting booth had they been exposed to those arguments can never be ascertained.

The alternative to recognition suggested by the court below, an employer petition upon union demand for recognition, is no less destructive of these considerations. As the court below noted, an employer, as the Petitioner in a representation case would not be able to demand a representation hearing. The result would be a consent election which yields a quicker election than if the matter went to hearing.[24] An employer, unsophisticated in such matters and unfamiliar with union organizational campaign tactics and the nature of the appeals made to his employees, would have very little, if any, time to even learn what campaign issues the union had raised, much less the time to formulate an appropriate response so that his employees would have ample opportunity to give both views on all such issues studied consideration.

While the expeditious conclusion of representation cases resulting in an election and certification is certainly desirable, and dilatory tactics should be discouraged, such considerations are not sufficiently strong to vitiate the legitimate right contained in Section 8(c) and the policy of encouraging free and reasoned employee choice.[25]

24. See *Linden supra,* 84 LRRM at 2186, n. 48.

25. Moreover, the lower court's view that the desired expedition will necessarily result from the policy it advocates is tenuous at best. Thus, while the source cited by the court at footnote 48 of its opinion explains that a contested representation case is likely to take from sixty to sixty-three days between petition and balloting, and a consent election where the hearing is waived is likely to take twenty to twenty-three days, statistics reveal that an unfair labor practice proceeding required to establish the existence of a Section 8(a)(5) violation is likely to take much longer. In 1968, the year that *Wilder* was initially decided, the Board's records show that between January and June the median time between the filing of an unfair labor practice charge and a Board decision in a contested case was 388 days. *Gissel, supra,* at 611, n. 30. And, because of the ever increasing case load, the backlog of unfair labor practices has steadily increased each year since then. *Thirty-Seventh Annual Report of the National Labor Relations Board,* at 14, Chart 11 (1972). It can fairly be predicted that, under the rule suggested by the court below, employers will not file representation petitions, and unions, choosing not to file petitions themselves, will be required to establish their representative status in unfair labor practice proceedings. Accordingly, many, if not most representation matters that are now resolved by Board election will be resolved in lengthy unfair labor practice cases instead. Therefore, the operative effect of the rule advocated by the lower court, contrary to that court's view, will not contribute to expedition but will result in even greater delay. Moreover, as a further result of the lower court's suggested rule, representation matters will be determined in the unfair labor practice forum rather than through the representation election machinery that Congress so carefully designed for the proper resolution of such matters. Clearly, such results are contrary to the prompt and proper resolution of representation questions, and the decision below, which encourages those results, should be voided.

Certainly, the right to speak and the concommitant right to be informed are hollow rights unless their exercise to the fullest are guaranteed. The restriction placed upon their exercise is an infringement unwarranted by the counter considerations urged by the court below.

C. The Decision Below Is Contrary to the Policy Reflected in Section 8(b)(7)(C).

By its very language, Section 8(b)(7)(C) condemns recognitional picketing in lieu of resort to the representation process by making such conduct on the part of unions an unfair labor practice[26] enjoinable under the Act.[27] The lower court's inter-

26. Section 8(b)(7)(C) in relevant part provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining

(Continued on Next Page)

pretation of Section 9(c)(1)(B) yields a result that cannot logically be accommodated with Section 8(b)(7)(C) and encourages recognitional picketing contrary to the policy expressed therein.

Recognitional picketing is unlawful under Section 8(b)(7)(C) where such picketing has been conducted "without a reasonable period of time", not to exceed thirty days from the onset of the picketing. The language of Section 8(b)(7)(C) does not specify that either the union or the employer is required to file a petition; however, if the union fails to file one within a "reasonable" time, the proscriptions of 8(b)(7)(C) attach to the picketing, and in that sense, union—not employer—resort to the representation process is mandatory. The protection afforded employers by that Section thus turns on the *union's* timely resort to the Section procedures. If the union chooses not to use those procedures, the employer has the right to pursue its remedies under Sections 8(b)(7)(C) and 10(1). However, under the lower court's view, that employer petitions are obligatory whenever a union demands and pickets for recognition, the whole thrust of 8(b)(7)(C) is reversed; despite a union's inability to obtain sufficient support to permit it to file for an election or to file refusal to bargain charges, which would allow it to escape injunction of its picketing and a finding of a violation under Section 8(b)(7)(C), its conduct, nonetheless, would be exculpated from proscription, and injunctive relief could never be obtained; and, despite the fact that the union's conduct would result in the damage Section 8(b)(7)(C) seeks to prohibit, the protection afforded employers by that Section and Section 10(1) is rendered meaningless.

representative, unless such labor organization is currently certified as the representative of such employees:

* * *

(C) where such picketing has been conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing."

27. See, Section 10(1).

Such a result encourages unions, as in the instant cases, to resort to organizational picketing and prolonged industrial disruption, contrary to the expressed mandate of Section 8(b)(7)(C). Accordingly, such a result should be rejected by this Court.

D. The Decision of the Court Below Impermissibly Restructures the Nature of the Representation Process.

By placing the burden of instituting the representation process on employers, the lower court restructures and alters the nature of that entire process. As the party demanding recognition, the burden of proving its entitlement to representative status in an appropriate unit is on the union. It always remains of the union. If an employer were required, as a matter of Board policy, to institute representation proceedings everytime a union claimed recognition, the union would be relieved of its burden of establishing a sufficient showing of interest to gain an election.[28] Additionally, as the Court below found, the employer would be required to designate the bargaining unit and "therefore would not be entitled, as an objecting party, to request a [representation] hearing."[29] The effect of this would permit the union to escape inquiry into the appropriateness of the unit, inclusions or exclusions of categories of employees within that unit, or other defects in the union's claim of representative status.

Aside from this impermissible shifting of burdens from the unions seeking representation to employers, the rule suggested by the Court of Appeals below leads to tactical misuse contrary to the nature and the purpose of the representation process.

28. A union petition filed under Section 9(c)(1)(A) requires that the petition be supported by 30% of the employees in the unit. An employer petition filed under Section 9(c)(1)(B) requires no such interest showing. National Labor Relations Board Statements of Procedure, 29 CFR Sec. 101.18(a).

29. *Linden, Supra,* 84 LRRM at 2186, n. 48.

Certainly, as indicated by the legislative history of Section 9 (c)(1)(B), the representation process is not a tool or lever which an employer can use to gain unfair advantage in order to defeat a union campaign. Equally, that process is not designed to afford unions similar tactical maneuverability. However, the decision of the court below permits unions to use the Board's procedures for such purpose.

A union, by demanding recognition, could at its option force an employer either to recognize it or file an employer petition *even if the union does not have majority support*. By setting up a picket line with a few loyalists, which is honored out of fear or respect, a union could force an employer either to recognize it, even though the majority of employees did not desire to be represented by that union, or to file a representation petition which the union would be unable validly to file, because the union did not have a sufficient showing of interest, or because its proposed unit was not appropriate, or because, as contended in the instant case, the union's interest was tainted by supervisory participation.

There are further tactical misuses inherent in the rule articulated by the court below. For example, the unions argued below that an employer who files a petition without actual doubt as to the union's majority status violates Section 8(a)(5) as much as he does when, for example, faced with a picket line, he refuses to recognize the union. The lower court felt that it need not determine this question.[30] Consideration of this union contention, however, necessarily reflects the untenable position in which that court's decision places employers. If a union which actually does possess majority support in a given unit were to demand recognition, and the employer, pursuant to the court's rule, files a petition asserting a different unit to be appropriate, or raising other unit issues, the resolution of which would be undesirable to the union, the union could thereupon file unfair labor practice charges and then take the position in an unfair

30. *Linden, supra,* 84 LRRM at 2186.

labor practice proceeding that the employer did not actually doubt the union's majority status with respect to unit selection; that the employer's petition was merely dilatory; and that the employer thereby violated Section 8(a)(5).[31] In this way, a union could circumvent the election procedure and still obtain a bargaining order. Equally, under the court's suggested rule, a bargaining order would lie where an employer does not file a petition but initially rejects the union's demand. The employer is thus faced with a Hobson's choice, placed in that position by a rule which permits such manipulation of the Board's processes.

Contrary to the view of the court below, the desired expedition and avoidance of protracted litigation would not result if the Board were required to implement the decision below. Certainly, restructuring the Board's representation process in a manner which dispenses with prerequisites for certification and which makes that process a lever for manipulation without a "clear cut" directive "in either the text of the statute or the legislative history" is destructive of that process and is too high a price to pay for the questionable returns that might result.

31. The union could prevail in its unit assertion since the Act speaks of *"a* unit appropriate" for collective bargaining purposes. In a given plant, store or factory, there may be more than one bargaining unit which the Board could find to be appropriate. For example, it is not uncommon to find drivers and warehousemen in a separate unit from production employees, nor is it uncommon to find them represented in the same unit. A unit need not be more appropriate or most appropriate, so long as it merely is "appropriate." Therefore, a union seeking to avoid an unfavorable unit determination upon the employer's petition could prevail since, under the Board's practice, disposition of a Section 8(a)(5) unfair labor practice case is required prior to resolution of a pending representation case. *National Labor Relations Board Field Manual,* "Concurrent R [representation] and C [unfair labor practice or "charge"] Cases, Section 11730-11730.4. Therefore, since the Board must make a unit determination necessary to the disposition of the unfair labor practice case, it must act first on the unit more favorable to the union's chances of winning at the polls, despite the fact that the unit sought by the employer in his petition, though less favorable to the union's chances of success, may be equally appropriate.

III.

THE INSTANT CASE CALLS UPON THE COURT TO FULLY SETTLE THE LAW IN THE AREA OF RECOGNITIONAL BARGAINING ORDERS AND REJECT THE REMAINING VESTIGE OF "GOOD FAITH DOUBT" AS AN OPERATING CRITERION.

The error of the lower court's view stems from its refusal to disengage itelf from that aspect of the "good faith doubt" test contained in the "independent knowledge" *Snow & Sons* doctrine and engage in the analysis mandated by *Gissel* which requires consideration of the causal effects of unfair labor practices on the election process "in terms of their past effect on election conditions and the likelihood of their recurrence in the future" and whether the "possibility of erasing the effects of past practices and of ensuring a fair election (or fair rerun) by the use of traditional remedies" exists. *Gissel, supra,* at 614. Moreover, study of post-*Gissel* Board decisions reveals that, except in the type case as is presented herein where there are no unfair labor practices which could possibly affect the holding of a fair election, i.e. the "fourth category", the Board has failed to engage in the required causal analysis and suggests that "good faith doubt" considerations still play a role in the Board's determination of whether a bargaining order is appropriate. If, as most participants in the area of labor relations agree, *Gissel* is to have any meaning in terms of finally settling a troubled and unsettled area of law, then this Court's *Gissel* command must be given full effect, direction must be brought to bear by the Court and the remaining vestige of "good faith doubt", as embodied in *Snow & Sons,* must be rejected.

The fact that the court below and the Board disagree as to the proper scope and application of *Snow & Sons,* and that it is this disagreement which gives rise to the instant cases, compels that this Court give consideration as to whether the doctrine of independent knowledge has any continuing validity since employer knowledge or lack of knowledge of a union's majority

status has no relationship to the causal effects of employer conduct on probability of holding a fair election.[32] Since "[S]ecret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support,"[33] *Gissel* commands that the Board conduct an election unless pervasive unfair labor practices make a fair election improbable. The fact that an employer, a layman who would have no knowledge of the Board's *Snow & Sons* rule or, perhaps, the existence of the election process, might succumb to a union's pressure to agree to a card check and later changes his mind, does not, by such an act alone, engage in conduct that frustrates the antiseptic conditions necessary to a free election.[34] *Snow &*

32. Thus, while the *Gissel* Court, in reviewing the evolution of the "good faith" doctrine, understood *Snow & Sons* to represent that type of case where "the employer had come forward with no reasons for entertaining any doubt [as to the union's majority status] and therefore that he must have rejected the bargaining demand in bad faith," the Court clearly stated its further understanding that in *John P. Serpa, Inc., supra,* "the Board had limited *Snow & Sons* to its facts." *Gissel, supra,* at 594-595. It is clear, however, that in tracing the history of the "good doubt" doctrine, the Court did not evaluate *Snow & Sons* in *Gissel.* However, in light of *Gissel,* that evaluation is compelled herein.

33. *Gissel, supra,* at 602.

34. In this regard, Professor Lesnick has commented:

> "If an employer is to be permitted, first, to insist on an election, and then to campaign against the union in that election, it is perfectly clear that he is being permitted to reject the collective bargaining principle so long as his employees do not, by voting for the union, oblige him to accept it.
>
> * * *
>
> The Board has explicitly declined to rely on lawful antiunion conduct as a ground for inferring that an initial refusal to recognize was unlawful. But the taking of this step, unless no more than obeisance to the language of section 8(c), implies that a legitimate purpose of the election is not simply to ascertain the validity of the union's initial claim to represent a majority, but also to test the durability of that majority in the crucible of a pre-election campaign. Once that fact is acknowleged, it seems obvious that it is entirely irrelevant to the legitimacy of the employer's conduct whether the union initially commanded a majority, which it hoped to hold through a campaign, or began with something less than fifty percent support, which it hoped to augment." Lesnick, *Establishment of Bargaining Rights Without an NLRB Election,* 65 Mich. L. Rev. 851, 858-9 (1967).

Sons is thus simply an anachronism that is no longer viable in light of the directive of *Gissel*.[35]

The circumstances of *Snow*, which was decided during the *Joy Silk*[36] "good faith doubt" era, themselves are illustrative. There the Board's Trial Examiner found that the first time the employer had any inkling of labor unrest was when the union's representative visited him and demanded recognition; that he agreed to the authorization card check because he had felt pressured by circumstances and merely wanted to ascertain the degree of unrest; and that he repudiated the card check solely because he preferred that his employees express their choice in a Board election.[37] The Trial Examiner expressly found that the employer's repudiation of the card check was not motivated by its desire to gain time to unlawfully dissipate the union's majority, distinguishing the cases relied on by the General Counsel because in those cases, the employers' repudiations *were accompanied by extensive unfair labor practices.*[38] Accordingly, the Trial Examiner found no violation of Section 8(a)(5).

The Board did not disagree with the Trial Examiner's findings, but found a violation, nonetheless, simply because the employer

35. As the Board freely acknowledges, the purpose of retaining the *Snow & Sons* doctrine is to "encourage the parties to adhere to their voluntary agreements." Board's petition for Writ of Certiorari herein, at 15, n. 18. It appears to the *Amicus* that the enforcement of such "quasi-contractual" obligations between unions and employers is not a proper consideration for the Board in determining the propriety of a bargaining order when the purpose of the Act is the enforcement of *employee* rights, which are better protected through the statutory election process when that process may be fairly utilized.

36. *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1940), enf'd., 185 F. 2d 732 (CA DC, 1950) *cert. denied*, 341 U. S. 914 (1951), articulated the good faith doubt test that was "virtually abandoned" even before *Gissel*. See, *e.g.*,: *Benson Wholesale Co., Inc.*, 164 NLRB 536 (1967) *Taitel & Son*, 119 NLRB 910 (1957). Moreover, even prior to *Gissel*, unfair labor practices too insubstantial to warrant an inference of lack of good faith doubt in rejecting a union's recognition demand were held not to support bargaining orders. *Hammon & Irving, Inc.*, 157 NLRB 1071 (1965); *Hercules Packing Corp.*, 163 NLRB 264, *affirmed*, 386 F. 2d 790 (CA 2, 1967).

37. *Snow & Sons, supra*, at 718-721.

38. *Id.*, at 720.

"had no reasonable doubt as to the union's majority status."[39] Thus, the Board's so-called independent knowledge test is grounded in and constitutes a backtracking into the area of subjective inquiry that is no longer valid in light of the "Gestalt" of *Gissel*.[40]

Further, except in "type four" cases it is clearly evident that the Board has not followed through on the *Gissel* command to weigh the effects of employer practices in determing whether a bargaining order is necessary to remedy the effects of those practices. Surveys of post-*Gissel* cases conducted by the legal scholars confirm this analysis,[41] and various cases that have reached the Court of Appeals suggest that the Board has not really abandoned the good faith concept and, instead of engaging in the mandatory causal analysis, has merely substituted the "talismanic words or ritual phrases" of *Joy Silk* with the "magic words" contained in the *Gissel* opinion. *N. L. R. B.* v. *Gibson Products Co.*, ____ F. 2d ____ 86 LRRM 2636, 2641 (CA 5, May 31, 1974). Analysis of the Board's treatment of two comparable cases, *Gibson, supra*, and *General Steel Products*, one of the original *Gissel* cases, on second remand, 199 NLRB No. 121 (1972), are illustrative.

39. *Id.*, at 710.

40. See, A. S. and T. G. S. Christensen, *Gissel Packing and Good Faith Doubt: The Gestalt of Required Recognition of Unions Under the NLRA*, 37 U. Chi. L. Rev. 411 (1970), wherein the authors, borrowing from the concept of Gestalt psychology, forcefully make the argument that *Gissel* represents a configuration or integrated pattern of all that went before in which subjective inquiry plays no role.

41. See, *e.g.*,: A. S. and T. G. S. Christensen, *supra;* and G. Carson, *The Gissel Doctrine: When a Bargaining Order Will Issue*, 41 Fordham L. Rev. 85, 97 (1972) wherein the author concludes:

> "[I]n every case [remanded for reconsideration in light of *Gissel*], the Board appears to have merely rephrased its opinion, replacing the *Joy Silk* language with *Gissel* language.
>
> In reaffirming the initial bargaining order, the Board would reiterate its former unfair labor practice findings and couch its decision in one or more of the following *Gissel* phrases: Traditional remedies could not ensure a fair rerun; unfair labor practices establish the likelihood of their recurrence; a fair election rerun is unlikely; or the unfair labor practices were so coercive and pervasive as to destroy utterly the conditions necessary for a free election." (Footnotes omitted).

Upon remand from this Court, the Board, in its first supplemental decision concluded that *General Steel* was a Category I case, without re-opening the proceeding, and reaffirmed its pre-*Gissel* bargaining order.[42] When the case again went to the Fourth Circuit, that court criticized the Board's "apparent unwillingness" to seriously consider the questions raised by *Gissel*, and remanded the case to the Board to require inquiry into whether a fair election was probable.[43] On second remand, the Board's Administrative Law Judge Harold X. Summers carefully engaged in the analysis mandated by *Gissel* and concluded that a fair election could be held, and the Board affirmed. 199 NLRB No. 121 (1972).[44]

At virtually the same time, however, that the Board affirmed Judge Summers' analysis in *General Steel*, it issued its second supplemental decision in *Gibson Products, supra*, 199 NLRB 115 (1972). There, the Board mechanically applied the *Gissel* language and, contrary to its *General Steel* decision concluded that *Gibson* was a Category I case, despite its earlier finding that the unfair labor practices involved placed the case within Category II.[45]. When the case went back to the Fifth Circuit on the second petition for enforcement, that Court took the Board to task for its failure to adhere to the teachings and purpose of *Gissel*, and, rather than remand the case where the Board had had opportunity to engage in the *Gissel* analysis but failed twice to do so, simply followed the *Gissel* directive itself and concluded that because of their minimal effect on the election process, the unfair labor practices fell into Category III and did not warrant a bargaining order. Moreover, the Fourth and Fifth Circuits are not alone in recognizing that the Board

42. 180 NLRB 56 (1969).

43. 445 F. 2d 1350 (1971).

44. Administrative Law Judge Summers' opinion contains an excellent analysis of the mandate in *Gissel* and application of the *Gissel* criteria to the facts of that case. See ALJD, 199 NLRB No. 121, *supra*, slip opinion at 1-22.

45. See, *Gibson, supra*, 86 LRRM at 2636-41.

apparently has yet to free itself from the *pre-Gissel* rationale and analyze recognition cases according to the *Gissel* directive. Where the Board has failed to follow the *Gissel* command, Courts of Appeals have refused to enforce Board bargaining orders.[46] It would therefore appear that the Board (except in cases precisely like those involved herein) and the court below are among the few, if any, who are not committed to this Court's *Gissel* rationale, propelled into their positions because of the remaining vestige of "good faith doubt" embodied in *Snow & Sons*. If *Gissel* is not to be rendered devoid of meaning, then direction in the analysis command therein must be given by this Court.

Were the casual analysis mandated by *Gissel* undertaken in the *Snow & Sons* situation, it is transparent that no bargaining order remedy would be awarded. That is, an employer's revocation of his promise to agree to a card check, absent any unlawful or coercive conduct, has no effect whatsoever on the laboratory conditions which are conducive of a fair election, and a bargaining order is, therefore, *under Gissel*, not an appropriate remedy. Accordingly, the remaining vestige of good faith doubt contained in the *Snow & Sons* doctrine should be rejected by this Court.

46. See, *e.g.*,: *Peerless of America* v. *N. L. R. B.*, 480 F. 2d 940 (CA 7, 1973); *N. L. R. B.* v. *Kostel Corp.*, 440 F. 2d 347 (CA 7, 1971); *Arbie Mineral Feed Co.* v. *N. L. R. B.*, 438 F. 2d 940 (CA 8, 1971); *Harper & Row Publishers, Inc.* v. *N. L. R. B.*, 476 F. 2d 430 (CA 8, 1973); *N. L. R. B.* v. *General Stencils, Inc.*, 438 F. 2d 894 (CA 2, 1971) *enf'ment. denied following remand*, 472 F. 2d 170 (CA 2, 1972); *Automated Business Systems* v. *N. L. R. B.*, ... F. 2d ....., 86 LRRM 2659 (CA 6, May, 1974).

CONCLUSION.

For the foregoing reasons, and those urged by the Petitioners National Labor Relations Board and Linden Lumber Division, Summer & Co., the Chamber respectfully prays that the decision of the Court of Appeals be reversed. In so doing, the Court should reaffirm its *Gissel* directive by directing that the causal analysis mandated therein be carried out and, as a necessary corollary, reject the doctrine of *Snow & Sons.*

Respectfully submitted,

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